

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;

- (3) Whether notice is given or claim timely made; and
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an administrative law judge if it is alleged the administrative law judge exceeded his or her jurisdiction in granting or denying the relief requested. See K.S.A. 44-551.

In this instance, respondent and its carrier contend the ALJ erroneously found that claimant sustained accidental injury or an occupational exposure and also exceeded his jurisdiction in awarding temporary total disability benefits. Based upon the record developed to date, the Board finds that the ALJ exceeded his jurisdiction and in doing so, failed to provide respondent the requisite due process.

Claimant concedes she has a long history of what one medical practitioner has called "brittle bronchial asthma." Her medical condition was known to respondent prior to her hire in December of 2000 and since January of 2001, she has been restricted from any exposure to inhaled toxins.

Claimant attempted to work with respondent and its insurance company with regard to her injury and when she failed to get a resolution, she filed her claim and served a seven-day demand upon respondent. This demand indicates her intent "to obtain temporary total disability compensation." (Claimant's exhibit 1).

A preliminary hearing was held on June 26, 2003 and during that hearing, claimant was allowed to speak regarding her alleged injuries. As the hearing progressed, it became clear to the ALJ that claimant had not brought with her all of the necessary medical documentation nor had she shared that documentation with respondent's counsel. The only medical record claimant produced was dated March 19, 2003 and authored by Dr. Bradley, the physician who regularly treats claimant for her pulmonary condition. This record indicates claimant should be off work until March 31, 2003 due to her "allergic bronchopulmonary Aspergillosis/asthma with exacerbation associated with a chemical exposure at work." (Claimant's Exhibit 2). Claimant had not yet provided a medical release allowing respondent's counsel to gather the necessary medical records.

In recognizing this problem, the ALJ directed claimant to provide both the court and opposing counsel with a complete copy of the exhibits referenced during the preliminary hearing. Then, at the conclusion of the proceedings, ALJ indicated he would allow claimant time to submit the additional documentation and records she had referred to during her testimony. Likewise, the ALJ indicated he would similarly allow respondent's counsel additional time to obtain the claimant's medical records and submit them as well.

The matter was then taken under advisement pending the receipt of the requested documents.

What happened next is unclear. On July 21, 2003 the ALJ issued his Supplemental Preliminary Order granting temporary total disability benefits and in doing so, referred to medical records apparently produced by claimant at some time following the preliminary hearing. Indeed, there is a large volume of medical records contained within the court's file. One section apparently came from respondent's counsel and relates to claimant's treatment by Dr. Bradley as evidenced by a transmittal letter. Precisely how the balance of the records came to be in the file is unknown, although it was likely from claimant based upon the ALJ's directions. It is entirely unclear however, what documents the ALJ considered in making his ultimate decision reflected in the July 21, 2003 order.

Respondent's objection to the ALJ's order is two-fold. First, respondent contends the ALJ erred in finding that claimant met her burden of proof of establishing an occupational disease or personal injury and second, that he exceeded his jurisdiction in awarding benefits for a period of 4.2 weeks.¹

The Board finds the ALJ exceeded his jurisdiction in awarding temporary total disability benefits. At the conclusion of the preliminary hearing, the ALJ directed claimant to sign the appropriate medical releases so that respondent could secure claimant's medical records. Claimant was also directed to provide complete copies to both the court and opposing counsel of the medical reports and narratives she referred to during the hearing.

Before respondent's counsel could request, receive, review and submit the medical records as directed, the ALJ went ahead and reviewed at least a limited number of those records supplied to him by claimant after the hearing (but apparently not to respondent's counsel) and issued an order. One of the primary records the ALJ relied upon was authored by one of Dr. Bradley's associates and dated July 2, 2003, a date well after the preliminary hearing. There are a substantial amount of medical records contained within the file and it is unclear whether the ALJ reviewed these documents, whether they were received after the hearing and before the order was issued, whether they were shared with respondent's counsel and precisely how they came to be in the file.

Under these facts and circumstances, the Board is persuaded the ALJ exceeded his jurisdiction in awarding temporary total disability benefits for the period of 4.2 weeks without first giving respondent an opportunity to be heard regarding the contents of the records provided to the court. The June 26, 2003 preliminary hearing was continued so that *both* parties could secure additional medical records and submit them to the court.

¹ The Supplemental Preliminary Order does not state the rate at which these benefits should be paid, only that 4.2 weeks of temporary total disability are due and owing.

Unfortunately, the ALJ's Supplemental Order was issued before respondent an opportunity to address the contents of the medical records. In a workers compensation case, the ALJ and the Board are not bound by the technical rules of procedure but they are to give the parties a reasonable opportunity to be heard and present evidence. K.S.A. 44-523; see also Box v. Cessna Aircraft Co., 236 Kan. 237, 243-44, 689 P.2d 871 (1984). In this case, that was not done.

In addition, K.S.A. 44-555c(a) authorizes the Board to review decisions made by the ALJ's. That statute indicates that such a review must be based upon the same evidence considered by the ALJ. Here, it is unclear what the ALJ considered.

For these reasons, the ALJ's Supplemental Preliminary Order is reversed and the case is remanded to the ALJ for further proceedings.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim. K.S.A. 44-534a(a)(2).

It should be noted that respondent's brief to the Board was 20 pages long. On an issue as narrow as the one presented here, this is excessive. In the future, brevity is encouraged.

WHEREFORE, it is the finding of the Board that Robert H. Foerschler's July 21, 2003 Supplemental Preliminary Order is reversed and remanded for further proceedings.

IT IS SO ORDERED.

Dated this ____ day of September 2003.

BOARD MEMBER

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Jeff S. Bloskey, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
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